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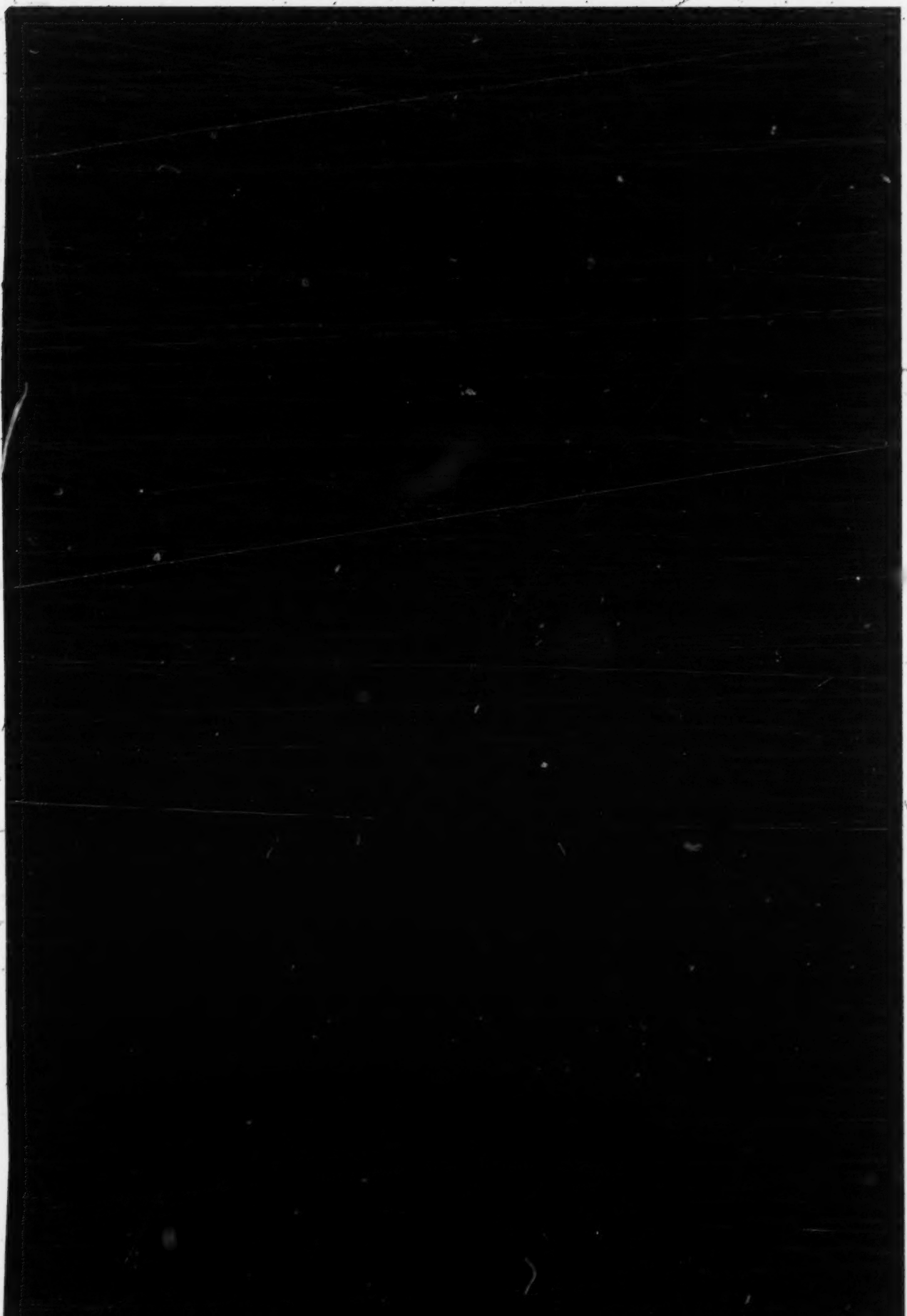

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# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 591

NEW ENGLAND MOTOR RATE BUREAU, INC., ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS*

## MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a judgment of a three-judge district court (J.S. App. A; 254 F. Supp. 633) dismissing appellants' suit to set aside an order (J.S. App. B; 323 I.C.C. 468) of the Interstate Commerce Commission approving a schedule of reduced rates filed by Railway Express Agency, Inc. ("REA") for



236-057—66——1

express service between 35 stated cities. This service involves the relatively low-cost transportation of a wire mesh container of a fixed capacity which a shipper may load with any number of articles so long as the total weight does not exceed 3000 pounds. Appellants are representatives of motor freight carriers and freight forwarders. The question involved is whether REA's use of containers is within its authority as an express carrier.

REA carries express shipments by rail and motor vehicle. Although it handles shipments ranging from about 20 pounds to carloads, its principal traffic consists of small shipments averaging about 50 pounds (J.S. 11a, 24a). Because REA's traffic was disproportionately composed of small shipments which resulted in lower load levels and higher costs as compared to its competitors, who carry larger average shipments, REA's rate structure was generally higher than other motor carriers.[1] As competition from motor carriers and freight forwarders increased, its comparatively higher rate structure and its reputation as a high-rate carrier caused it to lose substantial less-than-carload traffic (J.S. 24a). Faced with financial losses, REA revamped its operations and began to use containers in an attempt to regain some of this business (J.A. 13a).

REA urged before the Commission that by encouraging large volume shippers to tender their shipments in containers, rather than to ship in individual pieces, it could provide the same expedited service

[1] REA's rates were also somewhat higher than competing carriers' due to the somewhat higher costs usually associated with express service (J.S. 5a).

it had always furnished, pass on the savings in its operating costs for this type of service to the shipper in the form of lower rates, and remain competitive. After full administrative proceedings, the Commission approved REA's reduced rates.

The Commission rejected its examiner's determination that REA was not authorized to perform the proposed service. It held that the use of containers is within the firm's authority as an express company. Applying the criteria for bona fide express service which it had set forth nine years earlier,[2] the Com-

[2] In *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 581–82 (1955), decided upon the remand of *Arrowhead Freight Lines* v. *United States*, 114 F. Supp. 804 (S.D. Calif. 1953), the Commission held that:

> * * * [T]he rendition of a bona-fide express service by property carriers with authority to transport general commodities requires such carriers (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay.

mission found that REA was authorized to carry container traffic in express service.

The Commission's decision was affirmed unanimously by the district court (J.S. App. A).[3] The court below specifically analyzed each of the Commission's definitional criteria for express service as applied to REA's service by use of containers and concluded that the Commission properly approved the reduced rates (J.S. 2a–5a). In addition, the court rejected appellants' contention that express service must involve premium rates. So long as REA's container rates are compensatory, the court held, there is nothing in the historical definition of express service which obliges REA to charge premium rates.[4]

## ARGUMENT

This appeal presents no question warranting plenary consideration by this Court. The Commission's determination concerning REA's use of containers is a reasonable application to the facts of this case of the standards and the policies earlier established for express service.[5] Determination of the nature and

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[3] The container rates approved by the Commission and upheld by the court have been in effect since 1962.

[4] REA's container rates were found by the examiner and the Commission to be compensatory (J.S. 14a, 49a).

[5] See *Arrowhead Freight Lines*, *supra*, note 2. As noted by the court below, what appellants' case "really boils down to is that they would add a sixth factor" to the five criteria for express service set out by the Commission in *Arrowhead Freight Lines*—that express service must involve premium rates (J.S. 5a). On this point, the court below stated: "Rates, however, are only a result of the costs involved in transporting the commodities. If a premium charge is a frequent manifestation of express service, it is not an inevitable one (*ibid.*).

limits of express service is a matter committed by Congress to the Commission. Its factual determination, upheld by the court below, that the service involved here is an express service is entitled to great weight. There is nothing in its resolution of this factual question that presents an issue for this Court.

Appellants contend that this service violates congressional policy against unlimited entry of railroads into the motor carrier field (J.S. 8–9, 12). But there has been no such enlargement of REA's authority to render service in this case. And no such incursion could properly be said to result so long as REA is not offering a lower-grade, non-express service by using containers. Certainly there is, on the present record, no factual or legal justification for limiting REA to a small-package operation when large packages can and historically have moved in express service.[6] Nor is there any reason to require express companies to charge premium rates, so long as their rates are compensatory.

The Commission's decision enhances competition between express companies and motor carriers, results in improved service and lower rates to shippers, and conforms with the National Transportation Policy (49 U.S.C. preceding § 1). Motor carriers have no right to be insulated from all rate competition from express companies. Each mode of transportation service is entitled to assert its cost and service advan-

[6] Compare *Eastern Express, Inc.* v. *United States*, 369 U.S. 37, affirming per curiam 198 F. Supp. 256 (S.D. Ind.), where appellant motor carriers unsuccessfully attempted to limit appellant freight forwarders to small package shipments.

tages in fair competition against other modes of transportation service. Cf. *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744. It is no objection that REA's use of containers will enable it to compete more actively for larger *express* shipments; that is precisely the type of inter-modal competition which Congress hoped would take place.[7]

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General,*
DONALD F. TURNER,
*Assistant Attorney General,*
HOWARD E. SHAPIRO,
LAWRENCE G. MEYER,
*Attorneys.*

ROBERT W. GINNANE,
*General Counsel,*
LEONARD S. GOODMAN,
*Assistant General Counsel,*
*Interstate Commerce Commission.*

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[7] A few categories of commodities which are plainly unsuited for containerized transportation (*e.g.*, live animals, human remains, goods requiring refrigeration or insulation from heat) are for this reason excluded from REA's reduced rates (J.S. 8a, 22a). Exclusion of a few commodities, for obvious reasons, hardly makes the carriage of the included commodities any less an express service, so long as the other requisites are met. And, as noted by the court below (J.S. 4a), REA provides express service under other tariffs at higher rates for all commodities so excluded.

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